

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

NO. 312/53

WILLIAM F. FLETCHER, ALBERT V. DUKAKIS AND
HOWARD H. WILLIAMS, APPELLANTS

NEW YORK LIFE INSURANCE COMPANY

THE UNITED STATES OF AMERICA, APPEE

IN THE SUPREME COURT OF THE UNITED STATES

(22,042)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 816.

WILLIAM F. FLUHRER, ALBERT W. DURAND, AND
HOWARD H. WILLIAMS, APPELLANTS,

vs.

NEW YORK LIFE INSURANCE COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 Circuit Court of the United States for the Southern District
of New York. In Equity.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H.
WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Bill of Complaint.

To the Judges of the Circuit Court of the United States for the South-
ern District of New York, Sitting in Equity:

William F. Fluhrer and Albert W. Durand, citizens of the State
of New York and residents of the City of New York in said State,
and Howard H. Williams, a citizen of the State of New Jersey and a
resident of Plainfield in said State, bring this their bill of complaint,
in behalf of themselves and all other policy holders who are similarly
situated and who shall be entitled to avail themselves of the benefit
of this suit, against the New York Life Insurance Company, a cor-
poration organized under laws of the State of New York, located and
having its principal place of business in the City of New York in
the Southern District of New York in such State, and a citizen
thereof, and thereupon your orators complain and say:

First. Your orators show as follows:

1. That the New York Life Insurance Company hereby made de-
fendant herein is a corporation without any capital stock, created a
corporate entity and now existing under and by virtue of a Charter
duly granted by special Act of the Legislature of the State
2 of New York in the year 1841, and is, by such Charter and
by the Acts amendatory thereof, vested with certain corporate
powers which are duly exercised by the defendant as a mutual life
insurance company under the conditions, requirements, supervision
and control, prescribed by the Insurance Law of said State.

2. That all of the assets of defendant and all income by it re-
ceived, are acquired, invested, reserved, and held for the sole benefit
and protection of the holders of policy and annuity contracts issued
by defendant upon the conditions in said Insurance Law prescribed,
and such assets and income are paid and distributed to such holders,
at the times, in the proportions, and by the methods, in such condi-
tions of said Insurance Law fixed and determined.

Second. Your orators further show as follows:

1. That each of them is a policy holder of said defendant, owning
and holding in his own name and right, policies described as fol-
lows:

William F. Fluhrer; Policy No. 614,576; issued by defendant on
June 11, 1894; for the sum of \$12,500.

Albert W. Durand; Policy No. 574,551; issued by defendant on
December 22, 1896; for the sum of \$5,000.

Howard H. Williams; Policy No. 579,442; issued by defendant on December 20, 1893; for the sum of \$5,000.

Howard H. Williams; Policy No. 751,886; issued by defendant on October 6, 1896; for the sum of \$1,000.

Howard H. Williams; Policy No. 3,712,395; issued by defendant on May 10, 1905; for the sum of \$2,000;

and that said defendant in addition to the policies of your orators has outstanding approximately 981,590 policies of the approximate face value of \$2,002,809,227, and this suit is for an object common to them all. Your orators therefore bring this suit in their own

names and in their own behalf as policy holders in said defendant company, and also as the representatives and on behalf of such of the other policy holders similarly situated and interested as may choose to intervene and become parties hereto.

2. That they are informed and believe that at the close of business on the 31st day of December, 1909, the assets of defendant exceeded the sum of \$599,000,000, and that the full market value of the Government, State, and Municipal Bonds duly issued in this and other countries, which constituted a portion of such assets, was \$77,015,254, and included in such amount were Bonds issued by the United States Government due in 1925 of the market value of \$1,150,000; Bonds of the State of Massachusetts of a market value in excess of the sum of \$4,200,000; Bonds of the City of New York of a market value of a sum in excess of \$7,000,000; all of which Bonds are, as your orators are informed and believe, issued pursuant to lawful provisions exempting them from taxation for all purposes.

3. That included in the assets of the defendant as above stated are various parcels of real estate of the aggregate value as shown by the books of said defendant, of \$11,718,000, from which said defendant receives an annual income in excess of the sum of \$526,000 over and above all taxes, repairs, and expenses of maintenance thereof; of which real estate various parcels, having an aggregate value of over \$2,500,000, are located in foreign countries, namely, France, Prussia, Austria, Holland and Servia.

4. That said defendant is engaged in the business of writing life insurance all over the civilized world, and approximately one-quarter of all its business is derived from foreign countries in no way under the jurisdiction of the United States of America or any of its Colonies or dependencies.

5. That under the law of New York there is no distinction in substance between the methods of holding and preserving the assets of the defendant for the benefit of its policy-holders, and the methods employed by savings banks and benefit associations in holding their assets for depositors and members respectively, in that all assets are held for the benefit of the policy-holders, depositors, and members thereof, and all such corporations make no profits from the ownership of such assets for all surplus earnings must be apportioned for the benefit of such policy-holders, depositors, and members, and are the property of the same when so apportioned.

6. That many foreign and domestic corporations do business in the United States of America along lines similar to those pursued by

defendant, and the amount of business varies in the case of each corporation so that the exemption, provided in the statute hereinafter mentioned, of \$5,000 forms a widely different proportion to the net income of such corporations, depending on the aggregate amount thereof.

Third. Your orators further show as follows:

1. That they are informed and believe that, in alleged compliance with the requirements of an Act of Congress of the United States entitled "An act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes," passed August 5, 1909, and having in view the penalties imposed by such act and by the laws of the United States relating to the collection of internal revenue taxes, defendant proposes to make and file with the Collector of Internal Revenue of the Second District of the City of New York, on or before March 1, 1910, a return in the form prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, showing the amount of net income received by defendant during the year 1909, computed as in such Act prescribed and including in the income upon which such computation is made the income derived from said Bonds of the United States, the State of Massachusetts, and the City of New York, and defendant claims and asserts that under and by virtue of the alleged authority and requirements of such Act of Congress it is required and intends to pay to such Collector on or before June 1, 1910, a tax of One per centum on the net income of defendant for the year 1909, computed as aforesaid.

2. That they are informed and believe that the net income of defendant for the year 1909 is in excess of \$10,000,000, computing the same as in said Act of Congress prescribed, as follows:

Deducting from the gross amount of the income of defendant all its ordinary and necessary expenses actually paid within the year out of the income in the maintenance and operation of its business, including all charges such as rentals or franchise payments, and all losses actually sustained within the year and not compensated by insurance or otherwise; together with the sums other than dividends paid within the year on policy and annuity contracts, and the net addition, if any, required by law to be made within the year to reserve funds; together with all other deductions allowed by said Act of Congress.

Fourth.

1. Your orators further show that the provisions of said corporation tax contained in said Act of Congress are unconstitutional, null and void, in that the said tax is a direct tax in respect of the real estate held and owned by said defendant in its own right, which direct tax is not in and by said Act apportioned among the several States as required by Section 2 of Article I of the Constitution of the United States.

2. Your orators further aver that if the said corporation tax so incorporated in said Act of Congress be held not to be a direct tax, then its provisions are nevertheless unconstitutional, null and void, in that they are not uniform throughout the United States as re-

quired in and by Section 8 of Article I of the Constitution of the United States.

3. Your orators further aver that the said corporation tax is not uniform as to property, class or subject in that, as they are informed and verily believe, the net profits or income above actual operating and business expenses of many labor, agricultural and horticultural organizations, fraternal beneficiary societies, orders and associations, domestic building and loan associations, amount to more than \$5,000 per annum, but such Act creates an artificial distinction between such corporations and defendant herein, which is a mutual insurance company having no capital and dividing all its profits among its policy holders, and said tax by such Act is imposed upon the defendant and other mutual insurance companies but is not imposed upon the other corporations described in this paragraph, nor upon mutual savings banks, although in Massachusetts mutual savings banks are authorized by the Acts of 1907, Chapter 561, to establish and maintain mutual insurance departments on conditions in all essentials like those governing the business of said defendant.

4. Your orators further aver that the said corporation tax is not uniform in that, as they are informed and verily believe, it is
7 imposed upon a very small minority of the corporations of the United States, namely those which have net profits in excess of \$5,000 per annum; that the remaining corporations, comprising the great majority of the corporations of the United States, are by such Act exempted from the payment of said tax although they hold in the aggregate the greater portion of all corporate property in the United States.

5. Your orators further aver that said corporation tax is not uniform as required by Section 8 of Article I of the Constitution of the United States in many other respects beside those specifically mentioned in this bill of complaint, and that its provisions are therefore unconstitutional and void.

6. Your orators further aver that the said provisions of such corporation tax are likewise unconstitutional, null and void, in that they impose a tax upon income not taxable under the Constitution of the United States, and likewise income derived from the stocks and bonds of the United States and of the several states, counties and municipalities therein, which stocks and bonds are among the means and instrumentalities employed for carrying on their respective governments, and are not proper subjects of the taxing power of Congress; and as regards the stocks and bonds of the states, counties and municipalities, such corporations are distinct from the general government of the United States and their respective stocks or bonds are exempt from Federal taxation.

7. Your orators further aver that the provisions of said tax are unconstitutional, null and void, in that they impair property rights
8 vested prior to the passage of said Act, and in that they impose a tax upon the net profits of corporations which accrued prior to August 5, 1909, the date upon which such Act became a law, as well as upon profits received after such date.

8. Your orators further aver that the provisions of said corporation tax are unconstitutional, null and void, in that all corporations hereby taxed may, under and by virtue of its terms and provisions, be deprived of their property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

9. Your orators further aver that the provisions of said corporation tax are unconstitutional, null and void, in that all corporations hereby taxed may be compelled to produce and disclose their private books and papers in order to make them liable for the penalty or forfeit their property in violation of Articles IV and V of the Amendments to the Constitution of the United States.

10. Your orators further show that this suit is not collusive to confer upon a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

11. Your orators further show that if the defendant pays such tax out of its surplus earnings or net income, it will thereby diminish its assets, decrease the amounts which the policy-holders are entitled to receive as dividends or in reduction of the premiums upon their policies and lessen the value of all such policies to the holders thereof, with the result that such tax is a direct tax upon said policy-holders.

12. Your orators further show that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$5,000, and that it arises under the Constitution and Internal Revenue laws of the United States.

All of which actings, doings and pretenses of the said defendant are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of your orators in the premises.

Wherefore, and in consideration whereof, and forasmuch as your orators are remediless in the premises at and by the strict rules of the common law, and are relievable only in a court of equity, where matters of this nature are properly cognizable and relievable:

Yours orators pray:—

1. That it may be adjudged and decreed that the said provisions known as the corporation tax incorporated in said Act of Congress enacted August 5, 1909, are unconstitutional, null and void.

2. That the defendant be restrained from voluntarily complying with the provisions of said act and making the lists, returns and statements above referred to or paying the tax aforesaid.

3. And that your orators may have such other or further or different relief in the premises as to a court of equity may seem meet.

To the end therefore, that the said defendant may, if it can, show why your orators should not have the relief herein and hereby prayed, and may full, true, direct and perfect answer make to the

best and utmost of its knowledge, remembrance, information and belief, under its corporate seal and not under oath, an answer under oath being hereby expressly waived, to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated,

paragraph by paragraph, and it were specially interrogated thereunto; may it please your Honors to grant unto your orators a subpoena ad respondendum issuing out of and under the seal of this honorable court, to be directed to the said defendant the New York Life Insurance Company, commanding it on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the premises; and, further, to perform and abide by such further order and decree as to your Honors shall seem meet; and also a writ of provisional and a writ of perpetual injunction to the same purport, tenor and effect as is hereinbefore set forth and prayed.

And your orators, as in duty bound, will ever pray, etc.

CHAS. HOWARD WILLIAMS,
Solicitor and of Counsel for Complainants,
31 Nassau Street, New York City.

11 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Howard H. Williams, being duly sworn, says: I am one of the complainants above named. I have read the foregoing bill of complaint and know the contents thereof. The statements therein made are true of my own knowledge, except those alleged on information and belief, and as to those I believe them to be true. The sources of my information and grounds of my belief are the statements of its affairs, made by the defendant after the close of its business for the year 1909.

HOWARD H. WILLIAMS.

Subscribed and sworn to before me this 18th day of February, 1910.

[SEAL.]

HERBERT SCHUBERT,
Notary Public, Richmond County.

Certificate filed in New York County.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 18, 1910, John A. Shields, Clerk.

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Demurrer.

In the Circuit Court of the United States for the Southern District
of New York.

Docket 5. No. 182.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H.
WILLIAMS, Plaintiffs,

vs.

NEW YORK LIFE INSURANCE COMPANY, Defendant.

Demurrer of the Above-named Defendant to the Bill of Complaint
of the Above-named Plaintiffs.

This defendant, by protestation, not confessing or acknowledging
all or any of the matters or things in the said bill of complaint con-
tained to be true in such manner and form as the same are herein
set forth and alleged, doth demur to the said bill, and for causes of
demurrer sheweth,

That it appeareth by the plaintiffs' own showing by their said bill
that said plaintiffs are not entitled to the relief prayed by the bill
against this defendant.

Wherefore, and for divers other good causes of demurrer appear-
ing on said bill, this defendant doth demur thereto. And it prays
the judgment of this Honorable Court, whether said defendant shall
be compelled to make any answer to the said bill; and said
defendant humbly prays to be hence dismissed with its reason-
able costs in this behalf sustained.

JAMES H. MCINTOSH,
Solicitor for Defendant, 346 Broadway, New York.

JAMES H. MCINTOSH,
Of Counsel.

I hereby certify that the foregoing demurrer is in my opinion
well-founded in point of law.

JAMES H. MCINTOSH,
Of Counsel for Defendant.

STATE, COUNTY, AND CITY OF NEW YORK,
Southern District of New York, ss:

John C. McCall, of lawful age, being first duly sworn, deposes and
says, that the defendant in the above entitled action is a corporation;
that he is 2nd Vice-Pres. of said corporation and authorized to make
this verification and that the foregoing demurrer is not interposed for
delay.

JOHN C. MCCALL.

Subscribed in my presence and sworn to before me this 23rd day of February, 1910.

[NOTARIAL SEAL.]

RALPH FREEMAN,
Notary Public.

14 (Endorsed:) U. S. Circuit Court, Southern District N. Y.,
Filed Feb. 23, 1910, John A. Shields, Clerk.

15 *Final Decree Sustaining Demurrer and Allowance of Appeal.*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, Held at the United States Post Office and Court House Building, in the City of New York, this 23 Day of February, 1910.

Present: Hon. Walter C. Noyes, Circuit Judge.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H.
WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

This cause having come on to be heard upon the bill and the demurrer thereto, and counsel having been heard in support of said demurrer and in opposition thereto, it is by the Court now here

Ordered and decreed that the said demurrer be sustained, and that the bill of complaint of the complainants above named be, and the same is hereby, dismissed with costs.

WALTER C. NOYES, C. J.,
United States Circuit Judge.

Thereupon the above named complainants state that in this case the constitutionality of a law of the United States is drawn in question and in open court pray an appeal from said final decree direct to the Supreme Court of the United States pursuant to the statutes in such case made and provided. It is therefore further

16 Ordered that the said appeal be, and the same is hereby,
allowed as prayed for in open court, the defendant waiving
any bond.

The said defendant then admitted in open court due notice of the said appeal and duly waived service of any citation thereon.

WALTER C. NOYES, C. J.,
United States Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed
Feb. 23, 1910, John A. Shields, Clerk.

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Assignment of Errors.

Circuit Court of the United States for the Southern District of New York.

In Equity.

WILLIAM F. FLUHRER, ALBERT W. DURAND, and HOWARD H. WILLIAMS, Complainants,
against
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Assignment of Errors.

And now come the complainants above named, by Charles Howard Williams, their solicitor, and, in connection with the complainants' petition of appeal from the final decree made and entered herein on the 23 day of February, 1910, dismissing the complainants' bill of complaint with costs, make and file the following assignment of errors in pursuance of the statute and rule in such case made and provided.

I.

That the Court erred in not holding that so much of the Act of Congress of the United States entitled "An Act to Provide Revenue, "Equalize Duties, and Encourage the Industries of the United States, "and For Other Purposes," passed August 5, 1909, as relates to the levying and collection of a tax upon the income of corporations, as specified in Section 38, was unconstitutional and void, in that such Section violates Sections 2 and 8 of Article I., and Articles IV. and V. of the Amendments to the Constitution of the United States.

II.

That the Court erred in not granting to the complainants the relief prayed in and by their bill or any part thereof.

18

III.

That the Court erred in sustaining the demurrer to said bill.

IV.

That the Court erred in dismissing the said bill with costs.

Dated New York Feb. 23, 1910.

CHARLES HOWARD WILLIAMS,
*Solicitor for Complainants, 31 Nassau
Street, New York City.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y., Filed Feb. 23, 1910, John A. Shields, Clerk.

19 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to nineteen inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled William F. Fluhrer, Albert W. Durand and Howard H. Williams, Complainants-Appellants, against New York Life Insurance Company, Defendant-Appellee, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of February, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the said United States the One Hundred and Thirty-fourth.

[Seal United States Circuit Court, South. Dist. New York.]

JOHN A. SHIELDS, *Clerk*.

[Endorsed:] United States Supreme Court. William F. Fluhrer et al. Compl'ts-Appellants, vs. New York Life Insurance Company, Def't-Appellee. Transcript of Record from the Circuit Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 22,042. S. New York C. C. U. S. Term No. 816. William F. Fluhrer, Albert W. Durand, and Howard H. Williams, appellants, vs. New York Life Insurance Company. Filed February 26th, 1910. File No. 22,042.

516456

Supreme Court

OF THE UNITED STATES.

WILLIAM F. FLUHRER, ALBERT W.
DURAND and HOWARD H. WIL-
LIAMS,

Complainants-Appellants,
against

NEW YORK LIFE INSURANCE COM-
PANY,
Defendant-Appellee.

MOTION TO AD-
VANCE THE
CAUSE FOR
HEARING.

And now come the above named appellants and move that this cause be advanced for hearing and assigned for argument on March 14, 1910, for the following reasons:

This cause, as appears by the transcript of the record already on file herein, involves the constitutionality of Section 38 of the Act of August 5, 1909, which Section is known as the "Corporation Tax Law." Other cases involving similar issues have been already assigned for the day named, and it seems proper to the appellants that this cause should be argued on the same day in order that the Court may have before it at the time of the argu-

ment all the different phases of the operation of such law.

The present case differs, as the appellants are informed and believe, from each and every other cause now before the Court in certain essential particulars.

1. The defendant is a mutual insurance company, having no capital stock and no shares of any character. By law all its surplus earnings of every kind are apportioned to the policyholders equitably. The appellants contend that the Corporation Tax is as to them a direct tax upon the policyholders and is therefore invalid, because not levied in the manner provided by the Constitution of the United States.

2. Appellants further contend that the Corporation Tax is a direct tax upon the real and personal property of the corporation.

3. Appellants further contend that the Tax is not uniform as required by the Constitution, because defendant is a mutual company for the encouragement of savings. Nevertheless it is made subject to the Corporation Tax by the aforesaid law while mutual savings banks and beneficiary associations, having in all essential particulars the same provisions for apportionment of their surplus receipts, are exempted by such law from the payment of the Tax.

4. The defendant Company is engaged in business all over the world, and all of its profits are made subject to the Tax. The appellants therefore contend that the Tax is not uniform as required by the Constitution for the reason that foreign corporations of the same kind, doing business in the United States, are by the provisions of such law taxable

only upon that portion of their business done in the United States.

5. The defendant Insurance Company owns a large amount of Bonds issued by the Government of the United States, by several of the independent States, and by a large number of municipal corporations, as well as Bonds issued by foreign governments and foreign municipal corporations, all of which are, by the terms of the Bonds, exempt from taxation. The appellants contend that the afore-said tax is unconstitutional for the reason that the income of such bonds is by the terms of such law made part of the net income of the defendant for the purpose of taxation, according to the provisions of such law.

6. Appellants further contend that the Tax is unconstitutional inasmuch as a provision is made in such law for requiring defendant and other corporations to furnish evidence to the Government by which the Government may enforce the penalties provided therein for failure to make the necessary return of its net income or to pay the Tax.

Inasmuch as all, or nearly all, these several points are peculiar to the present cause, appellants respectfully move this Court that the cause be advanced for argument and assigned to March 14, 1910.

Dated, New York, February 25, 1910.

CHARLES HOWARD WILLIAMS,
Solicitor and of Counsel,
for Appellants,
31 Nassau Street,
New York.